No. 2034.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, as Collector of Internal Revenue of the United States for the First Collection District,

PLAINTIFF IN ERROR,

vs.

GEORGE D. BLISS, as Executor of the Last Will and Testament of George D. Bliss, deceased,

DEFENDANT IN ERROR.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

JOHN L. McNAB,
United States District Attorney;

EARL H. PIER,
Assistant United States District Attorney,

ATTORNEYS FOR PLAINTIFF IN ERROR.

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Defendant in Error.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

The plaintiff in error deeming himself aggrieved by the judgment of this Court made and entered herein on the first day of April, 1912, presents this his petition, praying that a rehearing of the above entitled cause may be granted by this Honorable Court.

In affirming the judgment of the Court below, this Court decided that since the income was to be paid to Harriet

L. Herrmann as long as she remained the wife of her husband, the estate in the income is too uncertain to admit of measurement [redacted] value and that therefore judgment for the defendant in error, the plaintiff below, should be affirmed.

The plaintiff in error contends:

I.

That there is an interest passing to the said Harriet L. Herrmann which can be definitely ascertained.

II.

The value being ascertainable, the Court should make a final disposition of the case upon the record in favor of plaintiff in error.

ARGUMENT.

I.

Is the estate ascertainable?

The decision of the Court fails to take into consideration all the terms of the trust clause under which Harriet L. Herrmann received the property. We would direct the Court's attention once more to the provisions of the will as shown by the consolidated Bill of Exceptions in the case of *Muenter* vs. *Union Trust Co.,* No. 2031, pages 125 and 126, in which it is stated that after giving an undivided one-third part to each of two daughters, that the deceased gave the remaining undivided third to Jeremiah F. Sullivan in trust upon the following terms, namely:

"1. To hold the same in trust for my daughter, Harriet L. Herrmann, so long as she continues to be the wife of George Herrmann.

* * * * * * * * * *

"3. To pay over to my said daughter annually the rents, issues, profits and income thereof after deducting the expenses of managing, controlling and operating the same.

"Said trust shall terminate whenever my said daughter ceases to be the wife of said George Herrmann. If my said daughter shall cease so to be the wife of said George Herrmann before her death, then and in that event the property embraced in said trust shall vest in fee simple absolute in my said daughter, Harriet L. Herrmann. In case my said daughter dies while she is the wife of said George Herrmann, in that event the property embraced in said trust shall vest in fee simple in such children of my said daughter as shall survive her, share and share alike."

Under the terms of this will it is readily seen that the smallest interest which Harriet L. Herrmann has in the property which is given her under the will is a life interest in said estate under which she is to receive the income, rents and profits thereof during her whole life, provided she still remains the wife of George Herrmann and if at any time she should cease to be George Herrmann's wife she comes into possession of the whole estate, so that if the contingency which the court points out should occur at any time short of the death of the said Harriet L. Herrmann, the happening of such contingency, to wit: the ceasing to be the wife of George Herrmann, would serve to increase the value of the estate which she took under the will of George D. Bliss, deceased, and could not in any way decrease the value.

It being thus shown that there is a minimum value of the estate passing to Harriet L. Herrmann which may be definitely ascertained, this case comes within the rule laid down in the case recently decided by the *Supreme Court of United States* vs. *Fidelity Trust Co.*, 222 U. S., 158.

II.

The value of the estate being definitely ascertained, the question arises as to what disposition should the court make of the case.

In the complaint in this action the value of the estate passing to Harriet L. Herrmann is fixed at $14,872.26. This is the value that was placed upon such interest by an executor. It is the value that was placed upon it by the Collector of Internal Revenue and upon which the tax was collected and this value is expressly acquiesced in by the complainant in bringing his action to recover the tax collected thereon. (Paragraph 6 of complaint, page 3 of record in case No. 2034.)

The court should therefore reverse the judgment of the court below and remand the case with instructions that judgment be entered for defendant.

This is not a case in which the defendant in error should be permitted to amend his pleadings:

(a) The plaintiff having tried his case upon one theory and lost, he should not be permitted to again try his case upon another theory, particularly where the plaintiff knew the facts, to wit: that the Collector of Internal Revenue had not figured out the value of the life estate passing to Harriet L. Herrmann at the time of fil-

ing this complaint and therefore at this late date after judgment, should not be permitted to amend his pleadings.

(b) Should the plaintiff below be allowed to amend his pleadings for the purpose of contesting the alleged excessive valuation of the estate, he thereby changes his cause of action to one which is barred by the statute of limitations and the disposition at present made of the case prevents defendant below from setting up the same.

The present action is brought under Sec. 3, Act of June 27, 1902, 32 Stats. L., 406.

> "Sec. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

The estate herein not being a contingent interest, recovery cannot be had under this statute and if plaintiff below recovers at all it must be under the general provisions relating to internal revenue for recovery of tax.

These are sections 3226, 3227 and 3228 of the Revised Statutes of the United States:

> "Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: Provided, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."
>
> "Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: Provided, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in

the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

"Sec. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: Provided, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."

Section 3226 requires that after appeal has been taken to the Commissioner of Internal Revenue, suit may be brought without first having decision of said Commissioner, should he delay his decision, *at any time within the period limited in the next section* (3227).

Section 3227 requires that suit be brought within two years.

According to the complaint:

Tax was paid February 3, 1904.

Claim filed with Commissioner of Internal Revenue February 2, 1906.

Complaint filed June 8, 1908.

No decision was made by the Commissioner of Internal Revenue upon claim filed in this matter.

The question then becomes: When did the statute commence to run?

Section 3228 requires that claims be presented within two years after cause of action accrued, which must mean two years after payment of tax under protest.

Consequently, I take it that the cause of action accrued upon payment of tax, and plaintiff below must file his complaint within two years.

The rule limiting actions which will give effect to all clauses of these statutes is:

Action must be brought within two years of paying tax.

As a condition precedent claim must be filed with Commissioner of Internal Revenue, and his decision obtained or six months elapse after filing said claim.

Any other interpretation put upon said statutes would not give effect to all of them.

(c) If the Court believes that the record does not sufficiently show that the statute of limitations has run, defendant below should be given an opportunity to plead same as a defense.

(d) Neither the protest nor claim presented to the Commissioner shows that the question of excessive valuation was presented to the Commissioner for his decision.

The grounds of illegality of tax should be pointed out to the Commissioner, otherwise the procedure before him would be useless.

The statute intends that a claim should be considered on its merits by the Commissioner of Internal Revenue before suit brought, and the grounds upon which an

appeal is sought must be set forth in the claim so that the Commissioner may properly pass upon the merits of the claim, otherwise, a claimant might place fictitious reasons in his claim, have his claim rejected, and bring suit, thus getting into the courts without having in good faith followed the procedure laid down by the statutes.

Hicks vs. *James' Administratrix,* 110 U. S., 272; affirmed 48 Fed. 542.

Nowhere in the claim is any contention made of an excessive valuation of the estate and until the Commissioner of Internal Revenue has been called upon to pass upon such a question, suit should not be brought in the courts to recover the tax alleged to have been collected upon the excessive valuation.

We therefore contend that this Court should reverse the judgment of the court below, and at least give plaintiff in error an opportunity to avail himself, if he so desires, of the defenses:

1. Statute of Limitations.
2. That claim was not properly presented to Commissioner of Internal Revenue.

Respectfully submitted,

JOHN L. McNAB,
United States Attorney.

EARL H. PIER,
Assistant United States Attorney.

I hereby certify that the above and foregoing Petition for Rehearing is, in my judgment, well founded and that the same is not interposed for delay.

John L. McNab,
United States Attorney.
Attorneys for Plaintiff.